

BOOK REVIEW

NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* (OXFORD UNIVERSITY PRESS 2015).

DAMIAN CLIFFORD*

The significant debate surrounding the importance and role of the right to privacy in modern society is frequently viewed as being at odds and even in competition with the right to free speech. These fundamental freedoms are often viewed as polar opposites. However, in *Intellectual Privacy* Neil Richards describes how this conflict only effectively exists in limited circumstances, and that at a fundamental level, these rights are in fact inherently connected and essentially complementary.

Although Richards argues that when the rights to privacy and free speech are truly in conflict free speech should win out, he specifies the need for modernising of the existing US notion of privacy in order to adapt it to protect our *Intellectual privacy*.

Richards' detailed analysis guides the reader through the complexities of the conceptual and historical foundations of the boundaries upon which the modern conflicts are defined in order to advance his notion and opinion for the need for increased protections against modern day public and private surveillance. We are pointed towards the significance of free speech and the approach of the US courts through nuanced argumentation and description.

However, in doing so Richards points to the fundamental connection with privacy and outlines the need for a normative framework through which modern society can adapt to the increased encroachments upon the private sphere.

In this context Richards introduces the notion of *Intellectual privacy* and defines it as 'a zone of protection that guards our ability to make up our minds freely.' (pp. 95) In essence, Richards links privacy and the ability to process and generate ideas (i.e. via thinking, reading and confiding with confidantes) before airing them in public as an inherent and inseparable aspect of the right to free speech. Simply put, without the freedom to develop an idea the ability to protect the expression of such an idea is rendered futile. The link is clearly established with the freedom of thought and this is a general theme which runs, as one might expect, throughout the book.

Richards divides his analysis into three major sections; *Part I. The Limits of Tort Privacy*, *Part II. The Promise of Intellectual Privacy* and *Part III. Information Policy and Civil Liberties*. Through this separation the author first outlines the conceptual development through a historical plotting of the modern interpretations of the key rights and the challenges technology presents. Building upon this foundation Richards then proposes a reconceptualization of this relationship, the introduction and analysis of the merits of his theory, and thus the move beyond tort privacy and thus the application of his notion of *Intellectual privacy*.

Part I of the book is comprised of five chapters namely; (1) *Tort Privacy* (2) *Free Speech* (3) *The Limits of Disclosure* (4) *Invasion* and (5) *Data*. Richards tracks the development of tort privacy from Warren and Brandeis' seminal article and its origins (chapter 1) to Brandeis'

* The research for this review is funded by The Research Foundation - Flanders (FWO) – (FWO Aspirant) KU Leuven Centre for IT and IP Law damian.clifford@law.kuleuven.be

developed interpretation of the right to free speech (chapter 2) and the inconsistencies this presented with his original conceptualisation of the notion of tort privacy and how they were offset (chapter 3).

The author then challenges the traditionally thinking of privacy and thus addresses its application beyond disclosure first in relation to invasions of privacy (with a concentration on revenge porn) and second *vis-à-vis* data and the fair information principles (i.e. the classification of data flows as speech). Indeed, in the first section of the book the author utilises a number of apt and striking examples in order to set the scene and context for the reader. The Warren, Brandeis and Whitney biographical (in chapters 1 and 2), to the story surrounding the Ryan Giggs debacle and injunction (chapter 3), and the Tyler Clementi tragedy (chapter 4) provide valuable insights and contextualisation.

Part II of Richards' analysis introduces his theory of *Intellectual privacy* (chapter 6) and then examines the three key components highlighted *supra* i.e. *Thinking* (chapter 7), *Reading* (chapter 8) and *Confiding* (chapter 9). In proposing his theory the author introduces why this concept matters describing how access and the ability to engage with the ideas of others also depends on the ability to read freely and think privately. As such, Richards opines that *Intellectual privacy* is significant as "*it gives new and possibly heretical ideas room to develop and grow before they are ready for publication.*" (pp. 101.)

The analysis then focuses on how *Intellectual privacy* works through a contextualisation of its application in the context of public monitoring before outlining the three key elements which are the focus of the remaining chapters. The three proceeding chapters thus elucidate further on the significance of the three core elements through the use of apt and insightful examples.

Thinking is highlighted through the example of the disclosure of search queries. Richards concludes that as *searching is thinking* our search

queries correctly merit protection. *Reading* is assessed through the entertaining elaboration of the example of the privacy afforded to consumers by e-readers and the associated popularisation of the *Fifty Shades of Grey* novel. The author notes that *Reading* permits us to develop our own opinions free from the deterrence of interference, disapproval or simple observation of others and argues that this is necessary in order to allow for the free exploration of seemingly unpopular ideas.

And finally *Confiding*, which the author examines through an analysis of the legal protections afforded to private communications by highlighting the historical development of the protections afforded as a means of establishing the continuing need for the protection of the ability to confide in the context of the migration to electronic means of communication. Richards singles out these three dimensions as key to his concept of *Intellectual privacy* and indicates their mutually supportive nature and their strong interconnection.

To simplify the author's key hypothesis each of these elements rests upon the others and accordingly they provide the complementary building blocks inherent to *Intellectual privacy*. Indeed, although *Thinking* (i.e. the freedom of thought) is inherent to a democratic society, in order to develop our ideas one requires access to the ideas of others or, to use the author's vernacular, *Reading* (i.e. the right to read and engage in intellectual exploration). *Reading* is thus clearly connected and both are also inextricably linked to *Confiding* as the confidentiality of communications is key in order to allow us to test our ideas before they are ready to be aired in public.

In Part III of the book Richards aims to build upon his detailed sketching and exploration of the complexities of the rights to privacy and free speech in the digital age and provide insights into how the '*time-honored values of the past*' can be adapted to our modern world and

technological development (pp. 154). The author divides this analysis into two chapters; *Beyond Tort Privacy* (chapter 10) and *Beyond Law* (chapter 11). As one might expect, through this division Richards first assesses the need to move beyond the traditional understanding of privacy and the reliance on tort privacy.

In this regard Richards introduces five simple principles which he believes need to be kept in mind in order to protect intellectual privacy through law namely:

1. *Intellectual Privacy Isn't just for intellectuals*
2. *We Mustn't forget the Fair Information Principles*
3. *Intellectual Records Are "Sensitive Records"*
4. *Rejecting Binary Privacy*
5. *The Importance of Confidentiality*

Richards then assesses measures beyond the law in order to protect the identified societal values and to integrate them as part of society's cultural and societal norms (i.e. *Beyond Law* chapter 11).

According to the author such an exercise is important as '*if we don't have a culture that is supportive of civil liberties, we cannot have civil liberties.*' (pp. 169) In this context the chapter assesses the importance of the role of intermediaries and their societal responsibilities given their impact upon the way we think, read and communicate. This leads Richards to the conclusion that information professionals have '*the obligation to be responsible stewards of personal information, and to help users make reasoned and responsible choices about how their personal information is used.*' (pp.176)

Drawing on this conclusion Richards uses the example of librarians as '*our first and oldest information professionals*' in order to elucidate the key to the adoption of professional ethics for information professionals. (pp.177) In this context the author notes the significance of the adherence to the fair information principles and offers Cavoukian's

Privacy by Design principles as key and thus highlights the importance of a substantive adoption rather than mere minimal compliance.

Overall Richards' book presents a novel and interesting approach to privacy in the digital age. The diverse examples paint an insightful picture which is easy to follow even for the non-privacy scholar. However, for the EU privacy expert one might be left wondering where the EU Privacy and Data Protection Framework would fit within such a theory and if, in essence, the application this EU framework presents a practical response to many issues presented in the analysis.

Nevertheless, despite this the research provides valuable insights into the US privacy perspective and a detailed overview of the historical development of their contrasting approach to privacy protection and their elevation of the right to free speech. Moreover, Richards' theory and insights provide plenty food for thought vis-à-vis debates which transcend national boundaries.

Therefore, European readers should use Richards work as a detailed and well written insight into the US privacy debate in the age of proliferated internet access and technological expansion.